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REGULATING RELIEF: PRIVATE RIGHT OF ACTION JURISPRUDENCE IN HEALTHCARE DISCRIMINATION CASES

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ABSTRACT

Section 1557 of the Affordable Care Act provides that entities covered by the Act which receive federal funds are prohibited from discriminating on the basis of race, color, national origin, sex, age or disability. But since the provision's enactment and the U.S. Department of Health and Human Services' promulgation of a regulation creating a private right of action for alleged discrimination under the Act, courts have disagreed on whether a private right of action exists to enforce Section 1557. This Comment summarizes the courts' confusion in applying the holding of Alexander v. Sandoval and Chevron deference to the nondiscrimination provision of the ACA and concludes federal courts should adopt the approach of the U.S. District Court in Rumble v. Fairview Health Services and allow plaintiffs to proceed with a private right of action to enforce Section 1557.

INTRODUCTION

Among the hundreds of pages of law put forth under the Affordable Care Act ("ACA"), a short section serves as one of the most important. Section 1557 is the nondiscrimination provision of ACA.¹ It stipulates that covered entities like medical providers, state agencies, and insurance companies receiving federal funds for health programs are prohibited from discriminating against patients and beneficiaries on the basis of race, color, national origin, sex, age and disability.² Further, it grants the U.S. Department of Health and Human Services ("HHS") the ability to craft rules in accordance with the section.³

In 2016, HHS issued regulations pursuant to section 1557 under 45 C.F.R. § 92 ("final rule").⁴ Importantly, the rule asserts a private right of action for beneficiaries wishing to bring a lawsuit against covered entities for race, sex, age and disability discrimination.⁵ However, before HHS issued the rule, courts struggled to interpret what Congress intended the legal rights to be for individuals who faced discrimination or who wanted to bring disparate impact claims under section 1557.⁶ Namely, the courts asked how section 1557 incorporates the four listed civil rights statutes

¹ Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (2012).

² *Id.* at § 18116(a).

³ *Id.* at § 18117.

⁴ Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376 (May 18, 2016) (to be codified at 45 C.F.R. § 92).

⁵ *Id.* at § 92.302.

⁶ See *infra* note 9.

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given the different standards of relief that apply to each statute.⁷ For example, the remedies available for race-based discrimination claims under Title VI are different from the remedies available for sex-based discrimination claims under Title IX.⁸ Because of these differences, two recent cases confronted with interpreting section 1557 resulted in opposite outcomes: *Rumble v. Fairview Health Services* and *Southeastern Pennsylvania Transportation Authority v. Gilead Sciences, Inc.* ("SEPTA").⁹

Rumble involves a gender discrimination claim brought by a transgender man against a hospital where he sought treatment.¹⁰ Using the agency deference standards outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* and *Skidmore v. Swift & Co.* to interpret section 1557's incorporation of the four named civil rights statutes, the *Rumble* court denied defendant Fairview's motion to dismiss, and concluded section 1557 establishes one standard for relief that includes *any* of the rights and remedies available under the named civil rights statutes and their corresponding regulations.¹¹ Thus, a court could grant relief to plaintiffs bringing intersectional discrimination claims (i.e., those involving two or more protected classes) based on any of the standards of relief available under the named civil rights statutes.¹² *Rumble* continues to be litigated, but, as discussed below, the influence of the final rule on the case's outcome is unclear.¹³

In *SEPTA*, plaintiffs brought a 1557 class action discrimination claim on the basis of race and disability to contest the price of Hepatitis C drugs sold by Gilead.¹⁴ Here, the court rejected *Rumble*'s conclusion that the standard for relief under section 1557 includes any of the remedies provided by the named civil rights statutes, especially for plaintiffs bring

⁷ 42 U.S.C. § 18116(a) (2012) (listing the Civil Rights Act of 1964, 42 U.S.C. 2000(d) et seq. (Title VI), Education Amendments of 1972, 20 U.S.C. 1681 et seq. (Title IX), Age Discrimination Act of 1975, 42 U.S.C. 6101 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. 749 (Section 504)).

⁸ See Elizabeth Edwards, et al., *Highlights of the Section 1557 Final Rule*, NATL. HEALTH L. PROGRAM 1, 45, 50 (2016), <https://www.aahd.us/wp-content/uploads/2016/05/Sec1557ACAnondiscrimination-NHeLPFinalRuleReview-1.pdf>.

⁹ See *Rumble v. Fairview Health Services*, No. 14-CV-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); cf. *Se. Pa. Transp. Auth. v. Gilead Sci., Inc.*, 102 F. Supp. 3d 688 (E.D. Pa. 2015).

¹⁰ *Rumble*, 2015 WL 1197415 at *1.

¹¹ *Id.* at *12 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding courts should defer to reasonable agency interpretations of the statutes they enforce where congressional intent is ambiguous); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (holding where an agency decision does not hold force of law court may determine its persuasiveness with a three part test)).

¹² *Id.* at 25-33.

¹³ See generally Order, *Rumble*, 2016 BL 281263 (D. Minn. Aug. 29, 2016) (No. 14-CV-2037) (ordering notes to be produced to the plaintiff for the benefit of possible deposition of witness).

¹⁴ *SEPTA*, 102 F.Supp.3d at 695-96.

intersectional claims.¹⁵ Instead, the court decided the race and disability claims separately.¹⁶ Thus, the race claim brought under a disparate impact theory failed because the court relied on *Alexander v. Sandoval*, which held that individuals do not have a right of action for disparate impact claims under Title VI regulations.¹⁷ The court closed *SEPTA* upon issuing its opinion.¹⁸

With limited pre-rule guidance from HHS, these cases differ on how to incorporate the remedies available to plaintiffs with intersectional discrimination claims in light of the restrictive holding of *Sandoval* and the remedies available under the other named civil rights statutes. Now that HHS has promulgated its rule on section 1557, however, this comment argues that the district court's interpretation of section 1557 in *Rumble* should be the standard used to determine the rights and remedies intended by Congress by deferring to HHS's final rule using the agency deference jurisprudence put forth by cases like *Chevron* and *Skidmore*.¹⁹

Part I compares the holding in *Sandoval* and how its outcome is at odds with HHS's creation of a private right of action under any of the listed statutes in section 1557. Part II examines the holdings and logic of the courts in *Rumble* and *SEPTA* related to bringing intersectional discrimination claims, especially when race-based discrimination claims are brought in conjunction with sex, age, or disability claims. Finally, Part III argues that the court in *Rumble* employed proper agency deference to determine Congress' intended remedies under section 1557, and thus, its analysis should be followed by other courts to grant relief to affected parties.

I. THE FINAL RULE AT ODDS WITH *SANDOVAL*

A. Private Right of Action under *Sandoval*

In *Alexander v. Sandoval*, the plaintiff brought a class action against the Alabama Department of Public Safety to challenge their English-only policy for driver's license examinations.²⁰ Plaintiff argued that because the

¹⁵ *Id.* at 698-99, n.3.

¹⁶ *Id.*

¹⁷ *Id.* at 701; *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

¹⁸ *SEPTA*, 102 F. Supp. 3d at 688. To the author's knowledge, the plaintiffs in *SEPTA* have not filed an appeal or taken further action since the promulgation of 45 C.F.R. § 92.

¹⁹ See *Chevron*, 467 U.S. at 837; *Skidmore*, 323 U.S. at 134.

²⁰ *Sandoval*, 532 U.S. at 279. The Supreme Court has not struck down English-only provisions as *per se* discriminatory. As the analysis below shows, because § 601 of Title VI was determined only to apply in cases of intentional discrimination, being able to sue under a disparate impact theory on behalf of an impacted class (e.g., limited-English proficient persons) would demand that the plaintiff show that the

department received federal funds, and thus, is required to comply with federal law, the English-only policy, though facially neutral, violated Title VI's prohibition on national origin discrimination.²¹ The district court ruled in the plaintiff's favor and granted her – and the class she represented – the injunctive relief she sought.²² The Eleventh Circuit Court of Appeals affirmed the lower court's decision holding that the defendants failed to prove that Title VI does not create a private right of action for disparate impact claims.²³

1. Supreme Court's Holding in *Sandoval*

Justice Scalia handed down the Supreme Court's 5-4 decision in April 2001.²⁴ In his opinion, he considered the question of whether there is a private cause to enforce the relief regulations promulgated by the Department of Justice (“DOJ”) under Title VI.²⁵ Title VI section 601 states generally that programs receiving federal funds are prohibited from discriminating against beneficiaries of those funds on the basis of race, color, or national origin.²⁶ Section 602 allows federal agencies administering such programs to issue rules and regulations to effectuate the provisions of section 601.²⁷ The court previously decided the question of private right of action for intentional discrimination claims under section 601 in *Cannon v. Univ. of Chicago* holding that such a right existed under that section.²⁸

However, in *Sandoval*, Justice Scalia concluded that the private right of action allowed under section 601 according to *Cannon* did not extend to the plaintiff's disparate impact claim under DOJ's regulations made pursuant to section 602.²⁹ Scalia wrote that the action could only be brought under section 602 if Congress intended to create such a right, but in the absence of such “rights-creating language” in the statute, he concluded that DOJ could not create such a right through its regulations.³⁰ He wrote, “Language in a regulation may invoke a private right of action that Congress

policy, though facially neutral, resulted in a discriminatory effect against the group she represents.

²¹ CARLOS R. SOLTERO, *LATINOS AND AMERICAN LAW: LANDMARK SUPREME COURT CASES* 185, 186 (2006).

²² *Sandoval*, 532 U.S. at 279.

²³ *Id.*

²⁴ *Id.* at 278.

²⁵ *Id.* at 279.

²⁶ See 42 U.S.C. § 2000(d) (2012).

²⁷ *Id.*

²⁸ See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 725 (1979).

²⁹ *Sandoval*, 532 U.S. at 281.

³⁰ *Id.* at 291.

through statutory text created, but it may not create a right that Congress has not.”³¹

2. *Sandoval*'s Application of *Chevron* and its Effects

In effect, Scalia's holding misapplies the deference standard articulated in *Chevron* that allows courts to look to agency interpretations of statutes to determine the intent of Congress. In *Chevron*, the Environmental Protection Agency was sued based on regulations it created pursuant to the Clean Air Act.³² In its opinion, the Supreme Court developed a standard to assess the scope of agency power to create regulations based on congressional intent.³³ The test states that where Congress has spoken directly on an issue, and its intent is clear, then the court should rely on what is written in the statute. Alternatively, if the intent is ambiguous or Congress has not spoken directly on the issue, courts should defer to the agency's interpretation of the statute as a permissible construction of the statute.³⁴ In *Sandoval*, Scalia saw the lack of “rights-creating language” as an unambiguous sign of Congress' intent *not* to create a private right of action for disparate impact cases, which allowed him to avoid deferring to DOJ's interpretation of Title VI in its regulations.³⁵

Scalia's opinion may have been narrow in scope, but it had far-reaching effects. By not deferring to DOJ's regulations on Title VI, *Sandoval*'s outcome limited the ability of groups experiencing racial discrimination through facially neutral policies to bring their claims, as Scalia contends, if Congress did not expressly allow such claims. In light of the longstanding agency deference precedent established in *Chevron*, the outcome of *Sandoval* continues to confuse courts, because it is inconsistent with other Supreme Court interpretations of anti-discrimination regulations.³⁶ Consequently, the holding of *Sandoval* is odds with HHS's regulations promulgated according to the ACA's section 1557, because the final rule asserts a private right of action for disparate impact claims under Title VI in direct opposition to the holding in *Sandoval*.³⁷ While the regulations seem to allow parties to bring claims under any of the listed statutes in section 1557(a), including disparate impact for race-based discrimination

³¹ *Id.*

³² *Chevron*, 467 U.S. at 840.

³³ *Id.* at 842-43.

³⁴ *Id.*

³⁵ *Sandoval*, 532 U.S. at 291.

³⁶ See Brianne J. Gorod, *The Sorcerer's Apprentice: Sandoval, Chevron, and Agency Power to Define Private Rights of Action*, 113 YALE L.J. 939 (2003).

³⁷ See *infra* note 46.

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claims, the intersectional application of the different remedies has resulted in different outcomes in recent litigation.³⁸

B. Rights and Remedies Authorized by Section 1557

1. Text and Purpose of Section 1557

Section 1557 protects individuals participating in health programs and activities that receive federal funds from discrimination on the basis of race, color, national origin, sex, age or disability.³⁹ It is not unlike other nondiscrimination provisions in omnibus social services bills such as the Food Stamp Act of 1977 or the Fair Housing Act.⁴⁰ Like those provisions, section 1557 invokes protections put in place by Title VI of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, the Age Discrimination Act of 1975, and the Rehabilitation Act of 1973 and the corresponding regulations based on the agency interpretations of the legislation.⁴¹

2. HHS's Interpretation of Section 1557 and Promulgation of the Final Rule

In May 2016, HHS issued its final rule on section 1557 under 45 C.F.R. 92, which came into effect on July 18, 2016.⁴² To address discriminatory acts and policies, the final rule outlines consequences, like loss of federal funding for failing to comply, enforced by HHS's Office of Civil Rights ("HHS OCR") and encourages voluntary actions on behalf of the covered entities to address discrimination grievances.⁴³ The rule also asserts a private right of action for beneficiaries wishing to bring a lawsuit against covered entities for discrimination.⁴⁴

Additionally, commenters hoped the new rule would solve the problem created by *Sandoval*, namely, that individuals do not have the right to bring disparate impact claims under Title VI.⁴⁵ In response to these comments, HHS firmly asserted the right of action for individuals to bring civil suits against covered entities for intentional discrimination and the disparate impact of discriminatory practices or policies.⁴⁶ This assertion is articulated

³⁸ See *supra* note 9.

³⁹ See 42 U.S.C. § 18116(a) (2012).

⁴⁰ See 7 U.S.C. § 2020(c) (2012); 42 U.S.C. § 3604(a) (1988).

⁴¹ See 42 U.S.C. § 18116(a) (2012).

⁴² See 45 C.F.R. § 92 (2016).

⁴³ *Id.* § 92.6 (2016).

⁴⁴ *Id.* § 92.302.

⁴⁵ See Edwards, et al., *supra* note 8.

⁴⁶ See 45 C.F.R. at §§ 92.301(b), 92.302(d); see also Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,440.

in the final rule and in a response to a comment concerning *Sandoval*'s impact on the ACA's invocation of protections provided by Title VI.⁴⁷ To that end, HHS interprets section 1557 to allow beneficiaries to bring claims under *any* remedy prescribed for discrimination against the protected classes named by the statute, including, contrary to *Sandoval*, disparate impact claims for race, color, and national origin discrimination.⁴⁸ The regulators note, however, that to maintain their current procedural scheme, age discrimination complaints will be handled in a different way from how race, color, national origin, sex and disability discrimination complaints are handled.⁴⁹ Thus, for example, the final rule allows disparate impact claims based on race brought under Title VI, but barred by *Sandoval*, to now be brought under Title IX's anti-discrimination protections, which allow disparate impact claims, but any intersection with age discrimination would be handled according to the Age Discrimination Act.⁵⁰

II. CONFUSION IN THE COURTS

Since the passage of the ACA in 2010, but prior to the promulgation of the final rule, several federal courts across the country encountered the question of how to interpret the protections provided in section 1557 in light of *Sandoval* and other cases on agency deference.⁵¹ Two cases analyzed this question on first impression: *Rumble v. Fairview Health Services* and *Southeastern Pennsylvania Transportation Authority v. Gilead Sciences, Inc.*⁵²

A. *Rumble v. Fairview Health Services*

In *Rumble*, plaintiff alleged gender discrimination under section 1557 for treatment he received from Fairview Health Services' hospital facilities and staff ("Fairview") as a transgender man.⁵³ He went to Fairview's emergency department where his gender identity was questioned by the receptionist and intake nurse, because it did not match the gender indicated on his driver's permit or past charts.⁵⁴ Further, he alleged maltreatment from attending physicians, insensitivities to his gender expression and privacy, as

⁴⁷ *Id.*

⁴⁸ See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,440 (emphasis added).

⁴⁹ *Id.* at 31,440.

⁵⁰ See Edwards, et al., *supra* note 8, at 10, 24; see also 81 Fed. Reg., at 31,466. The procedural differences associated with each of the named provisions are outside of the scope of this comment.

⁵¹ See e.g., *Rumble*, 2015 WL 1197415, at *11; *SEPTA*, 102 F. Supp. 3d 688, 697.

⁵² See e.g., *Rumble*, 2015 WL 1197415, at *9; *SEPTA*, 102 F. Supp. 3d 688, 687.

⁵³ *Rumble*, 2015 WL 1197415, at *1.

⁵⁴ *Id.* at *3.

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well as receiving paperwork detailing his procedures as “inconsistent with [his] gender.”⁵⁵ Rumble filed a gender discrimination complaint with HHS OCR in December 2013 and filed this lawsuit in June 2014 with the U.S. District Court for the District of Minnesota.⁵⁶

1. Judge Nelson’s Interpretation of Section 1557

Fundamentally, the parties disagreed on how to incorporate the four civil rights statutes into section 1557.⁵⁷ In her order denying defendant’s motion to dismiss, Judge Susan Nelson relied on the statutory interpretation canons to structure her analysis of what Congress intended the judicial remedies to be under section 1557.⁵⁸ In doing so, she read section 1557(a) as a list of the grounds on which discrimination is prohibited in a healthcare setting.⁵⁹ However, using the deference test set out by *Chevron*, Judge Nelson determined that section 1557 was ambiguous, because it was unclear which standards of the named statutes apply to determine liability, causation, and the plaintiff’s burden of proof, or if transgender people were included in the definition of sex.⁶⁰

In light of this ambiguity, Judge Nelson looked to agency guidance from HHS OCR to determine what it interpreted section 1557 to include.⁶¹ But at the time the only guidance available to the court was an opinion letter on determining gender discrimination against persons whose gender does not conform to stereotypical gender expression.⁶² Agency opinion letters lack the force of law required by *Chevron*, but *Skidmore* allows courts to determine the persuasiveness of such letters to guide their interpretation of ambiguous statutes.⁶³ The court determined from the persuasiveness of the OCR letter that Rumble was protected by section 1557 and could bring his claim on the basis of sex discrimination against his “gender identity.”⁶⁴

The court then turned to the question of which rights and remedies section 1557 provides to plaintiffs within the protected classes listed in the statute. Viewing section 1557 in conjunction with the ACA as a whole, Judge Nelson concluded the following:

⁵⁵ *Id.* at *4-7.

⁵⁶ *Id.* at *7-8.

⁵⁷ *Id.* at *10.

⁵⁸ *Rumble*, 2015 WL 1197415, at *9.

⁵⁹ *Id.* at *10.

⁶⁰ *Id.* at *9-10 (citing *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004); *Chevron*, 467 U.S. 837).

⁶¹ *Id.* at *10.

⁶² *Id.* at *10-11.

⁶³ *Rumble*, 2015 WL 1197415, at *10 (citing *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007); *Skidmore*, 323 U.S. at 140).

⁶⁴ *Id.*

It appears that Congress intended to create a new, health-specific anti-discrimination cause of action that is subject to a *singular* standard, regardless of a plaintiff's protected class status. Reading Section 1557 otherwise would lead to an illogical result, as different enforcement mechanisms and standards would apply to a Section 1557 plaintiff depending on whether the plaintiff's claim is based on her race, sex, age, or disability.⁶⁵

Judge Nelson continued:

If different standards were applied based on the protected class status of the Section 1557 plaintiff, then the courts would have no guidance about what standard to apply for [...] an intersectional discrimination claim.⁶⁶ [...] Congress also likely intended that the same standard and burden of proof to apply [...] regardless of the plaintiff's protected class status. To hold otherwise would lead to "patently absurd consequences that Congress could not possibly have intended."⁶⁷

2. *Rumble's* Conclusion

As a result of her analysis, Judge Nelson rejected defendant's motions to dismiss and found for plaintiff *Rumble* under section 1557 as it created a private right of action to bring discrimination claims under any and all of the listed statutes.⁶⁸ In doing so, she emphasized that this holding does not imply that Congress meant to create a new anti-discrimination framework and ignore the jurisprudence of the four listed statutes.⁶⁹ Instead, her opinion reconciles the inconsistent remedies available depending on which protected class had been discriminated against, which, if taken individually instead of intersectionally, would lead to an absurd result.⁷⁰

⁶⁵ *Id.* at *11 (emphasis added).

⁶⁶ *Id.*; see also *Rumble*, 2015 WL 1197415, n.7 ("Intersectional discrimination claims are based on the intersectionality of at least two of a plaintiff's protected class statuses."). For example, a black woman is protected by the status of her gender and race simultaneously.

⁶⁷ *Id.* at *12 (citing *United States v. Brown*, 333 U.S. 18, 27 (1948)).

⁶⁸ *Rumble*, 2015 WL 1197415 at *12. In her rejection of the defendant's motion, Judge Nelson states that the court "need not determine the precise standard to apply to Plaintiff's Section 1557 claim." To the author's knowledge, a trial date has been set, and a trial will proceed if defendant's motion to dismiss fails.

⁶⁹ See *id.*

⁷⁰ *Id.* at *11 ("[A] plaintiff bringing a Section 1557 race discrimination case could allege only disparate treatment, but plaintiffs bringing Section 1557 age, disability, or sex discrimination claims could allege disparate treatment or disparate impact.") (citing *Sandoval*, 532 U.S. at 293 (no private right to enforce disparate impact claims under Title VI); *Alexander v. Choate*, 469 U.S. 287, 299 (1985) (section 504 of the Rehabilitation Act allows for disparate impact claims); *Sharif v. N.Y. State Educ. Dep't.*, 709 F.Supp. 345, 361 (S.D.N.Y. 1989) (Title IX allows disparate impact claims)).

B. Southeastern Pennsylvania Transportation Authority v. Gilead Sciences, Inc.

The court in *SEPTA* disagreed with Judge Nelson's analysis and issued its first impression opinion on section 1557 less than two months after the *Rumble* court.⁷¹ Here, plaintiffs alleged defendant Gilead, a pharmaceutical company manufacturing an effective and expensive Hepatitis C drug, set its drug prices so high as to create a discriminatory effect on patients with disabilities (i.e., Hepatitis C) and racial minorities who are statistically more likely to have Hepatitis C.⁷² The high drug prices, plaintiffs claimed, violated section 1557's prohibition on race and disability discrimination.⁷³

1. Judge Dalzell's Interpretation of Section 1557

For a first impression analysis, like in *Rumble*, the court initially considers the plain language of the statute, then, if the language is ambiguous, it consults the statute's legislative history or relevant agency interpretation for clarity.⁷⁴ Finding no ambiguities in the language of the statute, Judge Stewart Dalzell turned to the question of whether section 1557's incorporation of the four listed civil rights statutes demonstrates Congress' intent to make a single private right – and remedy – available to the protected classes to bring discrimination claims.⁷⁵

Judge Dalzell determined that section 1557 does create such a right.⁷⁶ However, as to the remedies, the court determined that Congress intended to “import the various different standards and burdens of proof into a Section 1557 claim, *depending* upon the protected class at issue.”⁷⁷ Thus, the court went on to analyze the plaintiffs' disability discrimination claim and race discrimination claim using two different standards.⁷⁸ As a result, the court determined the plaintiffs' race-based discrimination claim must fail, because *Sandoval* precludes individuals from bringing disparate impact claims under Title VI.⁷⁹

⁷¹ See *SEPTA*, 102 F. Supp. 3d at 688.

⁷² *Id.* at 695.

⁷³ *Id.* at 696.

⁷⁴ *Id.* at 697 (citing *Lamie*, 540 U.S. at 534; *Chevron*, 467 U.S. at 844).

⁷⁵ *Id.* at 698 (citing *Sandoval*, 532 U.S. at 286).

⁷⁶ *SEPTA*, 102 F. Supp. 3d at 698.

⁷⁷ *Id.* at 698-99 (emphasis added).

⁷⁸ *Id.* at 700-702.

⁷⁹ *Id.* at 701. The disability claim also failed, because the court determined that Plaintiffs did not meet their burden of proving their disability.

2. *SEPTA* Compared to *Rumble*

The *SEPTA* court references the outcome of *Rumble* in a footnote.⁸⁰ It writes, “We do not find that adopting an interpretation of the statute whereby standards and burdens change based on a plaintiff’s protected class status to be patently absurd.”⁸¹ The note goes on to conclude that if Congress intended for the same rights and remedies to be available to all of the protected classes, it would have simply listed the classes and omitted the statutes.⁸² So, while Judge Dalzell agreed with the court in *Rumble* that section 1557 creates a new, singular cause of action under the ACA, he insisted that the rights and remedies available to plaintiffs would be applied depending on which discrimination claims they brought forth, i.e., sex, race, color, national origin, disability or age.⁸³

III. ACHIEVING CLARITY THROUGH PROPER DEFERENCE

A. HHS’s Endorsement of *Rumble*

As stated in Part I, HHS’s final rule creates a private right of action and allows for disparate impact claims.⁸⁴ In fact, HHS clarified their position in a response to a comment on the proposed rule referencing *Rumble*.⁸⁵ In doing so, HHS made it clear that the court in *Rumble* correctly anticipated their interpretation of how section 1557 incorporates the four listed statutes and the different rights and remedies they prescribe. That is, individuals seeking relief under section 1557 may bring their claims under *any* of the statutes listed and, thus, also have the remedies of those statutes applied to them as well.⁸⁶

B. Deference to the Final Rule

According to a report by the National Health Law Program (“NHLP”), a healthcare law advocacy and analysis group, the final rule “should help ameliorate the access-to-court barriers” that resulted from *Sandoval*.⁸⁷ This means that courts may see the final rule as effectively re-

⁸⁰ *Id.* at n.3.

⁸¹ *SEPTA*, 102 F. Supp. 3d at 698 n.3.

⁸² *Id.*

⁸³ *See id.* at 689-99.

⁸⁴ *See* 45 C.F.R. at §§ 92.301(b), 92.302(d); *see also* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,440.

⁸⁵ *See* 81 Fed. Reg. at 31,439.

⁸⁶ *Id.* (emphasis added).

⁸⁷ *See* Edwards, et al., *supra* note 8, at 24.

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jecting the outcome *Sandoval* by allowing plaintiffs claiming race-based discrimination to bring disparate impact litigation under section 1557, because HHS interprets section 1557 to include the rights and remedies available under any of the listed statutes.⁸⁸ NHeLP, like the court in *Rumble*, points out that the regulations do not provide specifics on what the plaintiff's burden of proof is to show intentional discrimination or a disparate impact, but speculates that the guidance in the other parts of the regulation point to what is required for compliance so a covered entity may avoid the potential consequences of non-compliance.⁸⁹

Ultimately, the outcome of a court's decision on a section 1557 claim will depend on the level of deference it embraces. A court could conclude that because Congress calls on HHS to promulgate rules in accordance with section 1557, it is up to HHS to determine what constitutes compliance and, in the event of non-compliance, discrimination.⁹⁰ A court could only come to this conclusion, though, if it employs the test created by *Chevron*, and determines that Congress intended to create a private right of action, and the final rule resolves the ambiguity created by the statute.⁹¹ This is precisely what the *Rumble* court did.⁹²

C. Ambiguity and Absurdity

Despite incorporating "rights-creating language" into section 1557 by naming the four civil rights statutes, Congress ambiguously left open the question of how to apply the rights and remedies of those statutes. Despite not being able to defer directly to the rule (as it did not exist), the court in *Rumble* came to the conclusion that HHS eventually codified: namely, that section 1557 allows plaintiffs to bring discrimination claims under any of the listed statutes, because concluding otherwise would lead to an absurd result, especially in the event of intersectional discrimination claims like in *SEPTA*.⁹³

CONCLUSION

Where Congress' intent to create certain rights or remedies is ambiguous, adequate deference to agency interpretations may make law en-

⁸⁸ See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,440.

⁸⁹ See Edwards, et al., *supra* note 8.

⁹⁰ See 42 U.S.C. § 18116(c) (2012); see also Gorod, *supra* note 36, at 945.

⁹¹ See Gorod, *supra* note 36, at 945-46.

⁹² See *Rumble*, 2015 WL 1197415 at *9 (citing *Lamie*, 540 U.S. 526; *Chevron*, 467 U.S. 837).

⁹³ *Id.* at *12.

forcement more effective, especially in cases of discrimination.⁹⁴ Indeed, Congress often calls on agencies with their select expertise to determine how best to enforce the law and ensure protection of the rights it creates.⁹⁵ With that in mind, if Justice Scalia had relied on well-established agency deference principles instead of the plain language of the statute, which may have lacked “rights-creating language,” but nevertheless created an ambiguity, the outcome of *Sandoval* may have been different. That is, despite his argument that agencies are not permitted to create private rights of action where Congress has not expressly created such a right, deference principles dictate that agencies are well within their power to expand and define those rights.⁹⁶ Ultimately, in future litigation on section 1557, courts, like in *Rumble*, should defer to HHS’s final rule on the rights and remedies Congress intended to make under the ACA in order for plaintiffs to bring claims of intentional discrimination and disparate impact under any of the listed statutes against covered entities that receive federal funds.

⁹⁴ See Gorod, *supra* note 36, at 944.

⁹⁵ See Gorod, *supra* note 36, at 945.

⁹⁶ See Gorod, *supra* note 36, at 946.